CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 239.

THE UNITED STATES, PETITIONER,

vs.

THE CORNELL STEAMBOAT COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI, FILED APRIL 21, 1905.
CERTIORARI AND RETURN FILED MAY 15, 1905.

(19724.)

a United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES, PLAINTIFF IN ERROR, (defendant below),
vs.
THE CORNELL STEAMBOAT COMPANY, DEFENDANT IN ERROR (plaintiff below).

Transcript of record. Error to the District Court of the United States for the Southern District of New York.

Printed under the direction of the clerk.

1 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America, to the judges of the District Court of the United States for the Southern District of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between The Cornell Steamboat Company, petitioner, against The United States, defendant, a manifest error hath happened, to the great damage of the said The United States, as is said and appears by its complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States Circuit Court of Appeals for the Second Circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 20th day of July, 1904, that the record and proceedings aforesaid being inspected, the said judges of the United States Circuit Court of Appeals for the Second Circuit, may cause further to be done therein, to correct
2 that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable George B. Adams and George C. Holt, of the District Court of the United States for the Southern District of New York, this 22nd day of June, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-eighth.

[L. S.] THOS. ALEXANDER,
Clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

GEO. B. ADAMS,
U. S. District Judge.

3 UNITED STATES OF AMERICA,
Southern District of New York, ss.

I Thomas Alexander, clerk of the District Court of the United States of America, for the Southern District of New York, by virtue of the

foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from two to twenty-one, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The United States, plaintiff in error, against The Cornell Steamboat Company, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, this 2nd day of July, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-eighth.

[SEAL.] THOS. ALEXANDER, *Clerk.*

(Endorsed:) The U. S. Circuit Court of Appeals for the Second Circuit. The United States, plaintiff in error (defendant below), vs. The Cornell Steamboat Company, defendant in error (petitioner below). Writ of error. Henry L. Burnett, U. S. attorney, attorney for plaintiff in error. Service of a copy of the within writ of error is hereby admitted this 23rd day of June, 1904, Benedict & Benedict, attorneys for defendant in error. U. S. District Court, S. D. of N. Y. Filed Jun. 23, 1904.

4 *To the Honorable Addison Brown, judge of the District Court of the United States for the Southern District of New York.*

The petition of The Cornell Steamboat Company against The United States respectfully alleges, as follows:

First. That The Cornell Steamboat Company is a corporation duly incorporated under the laws of the State of New York, and is resident within this district.

Second. That on or about the 9th day of January, 1901, a certain lighter called the "Bangor," having on board 1,883 bags of sugar, while in the waters of the port of New York, was in danger of being destroyed by fire, and that the tug "R. G. Townsend," belonging to the petitioner, at great risk and peril saved the said lighter and the said cargo of sugar from destruction by said fire.

That the said sugar had been imported from a foreign country and was, therefore, subject to duty under the laws of the United States, and at the time of said fire was still in the possession and under the control of custom-house officers of the United States.

That thereafter the owners of the "Bangor" paid to the petitioner a satisfactory sum for their services in saving the said lighter.

That your petitioner filed a libel in the District Court of the United States for the Eastern District of New York, against the said cargo of sugar, to recover compensation for the services rendered in saving said sugar. That on said libel the firm of B. H. Howell, Son & Company appeared in the suit and claimed the said sugar as owners thereof, and filed an answer in the cause and gave a stipulation for value, and

5 that thereafter the said cause came on for trial in said District Court, and on the 20th day of April, 1901, the said court made its decree, wherein and whereby it adjudged that the amount of the award to the libellants for salvage services rendered was fixed at ten per cent of the value of the property saved. And that, as it appeared that

the duties on said sugar, amounting to $6,000, had been paid to the Government of the United States provisionally and in such wise that, if the said sugar had been destroyed by said fire the said owners of said sugar would have been entitled to claim a repayment to them by the United States of the amount of duties upon said sugar, the owners of said sugar should pay to this petitioner ten per cent upon the value of said cargo of sugar, less the $6,000 which had been paid or deposited with the United States. And that a copy of said decree is hereto annexed and marked "Exhibit A."

Third. And the petitioner alleges that, by reason of the services rendered as above stated, the amount of $6,000 in duties aforesaid was saved to the United States. And that the petitioner is entitled to have and claim against the United States, by reason of said services and said decree, the sum of six hundred dollars, or ten per cent of the amount of said duties, inasmuch as the said duties in the possession of the United States were entirely saved to the United States by the services of the petitioner as above stated.

Wherefore the petitioner prays for a judgment or decree that the United States shall pay to the petitioner the said sum of six hundred dollars and costs.

BENEDICT & BENEDICT,
Petitioner's Attys., 68 Wall street, N. Y.

CORNELL STEAMBOAT CO.,
By S. D. COYKENDALL, *Pt.*

6 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Samuel D. Coykendall, being duly sworn, says that he is president of the petitioner herein, which is a corporation, and that the foregoing petition is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

S. D. COYKENDALL.

Sworn to before me this 1st day of August, 1901.

[SEAL.]

WM. F. JONES,
U. S. Comm., S. D. of N. Y.

7 EXHIBIT A.

At a stated term of the District Court of the United States for the Eastern District of New York, held at the court room, in the borough of Brooklyn, on the 20th day of April, 1901.

Present: Hon. Edward B. Thomas, district judge.

CORNELL STEAMBOAT COMPANY, for itself as owner, and for the crew of the steam tug "R. G. Townsend,"
vs.
1,883 BAGS OF SUGAR LATELY ON board the lighter "Bangor."

This cause coming on to be heard on the pleadings and proofs of the parties, and having been argued and submitted, and due deliberation

having been had, it is, on motion of Benedict & Benedict, libellant's proctors,

Ordered, adjudged, and decreed by the court that the amount of the award made to the libellants for the salvage services rendered is fixed at ten per cent of the value of the property saved, and that as it appears that the market value in New York of the sugar saved was $18,127.74, but that the invoice value was $12,245, and that the duties thereon, amounting to $6,000, had been paid to the Government of the United States, and that if the said sugars had been burned the claimants herein would have been entitled to a rebate of said duties, it is also

Ordered, adjudged, and decreed that the claimants herein pay
8 to the libellant herein the sum of twelve hundred and twenty-four 50/100 dollars, being ten per cent on the sum of twelve thousand two hundred and forty-five dollars, the invoice value of said sugars, together with their costs to be taxed.

And said costs having been taxed at the sum of forty-nine 81/100 dollars, it is further

Ordered that the libellants recover the sum of twelve hundred and seventy-four 31/100 dollars, and that said claimants be condemned to pay the said sum; and it is further

Ordered and adjudged that the said salvage award be apportioned three-fourths to the owners of said tug "R. G. Townsend" and one-fourth to the crew on board at the time of said service, the same to be divided in proportion to their wages.

EDWARD B. THOMAS, *U. S. J.*

(Endorsed:) Petition. Filed Aug. 1, 1901.

9 United States District Court, Southern District of New York.

CORNELL STEAMBOAT COMPANY }
vs. } Demurrer.
THE UNITED STATES. }

The defendants above named, by Henry L. Burnett, their attorney for the Southern District of New York, demur to the petitioner's petition herein as follows:

First. The court has no jurisdiction of the alleged cause of action against the defendants.

Second. The petition does not state facts sufficient to constitute a cause of action against said defendants.

Dated New York, December 21st, 1901.

HENRY L. BURNETT,
United States Attorney, Attorney for Defendants,
Room 50, P. O. Building, New York City (Borough of Manhattan).

(Endorsed:) Demurrer. Filed Jany. 7th, 1902.

10 At a stated term of the District Court of the United States of America for the Southern District of New York, held at the United States court rooms in the city of New York, on Tuesday, the 5th day of April, in the year of our Lord one thousand nine hundred and four.

Present: The Honorable George B. Adams, district judge.

THE CORNELL STEAMBOAT COMPANY
vs.
THE UNITED STATES.

This case having been heard on the petition and demurrer interposed thereto, and argued by the advocates for the respective parties, and due deliberation being had in the premises, it is now

Ordered, adjudged, and decreed by the court that the demurrer be overruled, and that the defendant have one week to answer herein.

GEORGE B. ADAMS.

(Endorsed:) Copy decree overruling demurrer. Filed April 7, 1904.

11 At a stated term of the District Court of the United States of America for the Southern District of New York, held at the United States court rooms in the city of New York, on Tuesday, the 19th day of April, in the year of our Lord one thousand nine hundred and four.

Present: The Honorable George B. Adams, district judge.

THE CORNELL STEAMBOAT COMPANY
vs.
THE UNITED STATES.

On motion, no opposition being made, and due deliberation being had in the premises, it is now

Ordered, adjudged, and decreed by the court that the answer interposed herein be withdrawn, and that the decree entered herein on the 5th of April inst., be amended by striking out the words "and that the defendant have one week to answer herein." And it is further

Ordered and decreed that this cause be submitted to the court for a written opinion setting forth the specific findings by the court of the facts herein and the conclusions of the court upon all questions of law involved in the case as required by the statute, and to render judgment thereon.

GEO. B. ADAMS.

Approved as to form.

HENRY L. BURNETT,
U. S. Atty.

(Endorsed:) Decree. Filed April 19th, '04.

12 United States District Court, Southern District of New York.

CORNELL STEAMBOAT COMPANY } Salvage on duties collected.
vs. Action against the United States,
THE UNITED STATES. } May, 1904.

Benedict & Benedict, for petitioner.

Henry L. Burnett, United States attorney, and Arthur M. King, assistant U. S. attorney, for defendants.

ADAMS, J.

This is a petition filed by the Cornell Steamboat Company against the United States, for the recovery of salvage on certain duties collected by

the Government. The main facts have been, in substance, agreed upon as follows:

"FINDINGS OF FACT.

"First. The Cornell Steamboat Company is a corporation duly incorporated under the laws of the State of New York, and is resident within the Southern District of New York, and is and was on the 9th day of January, 1901, the owner of the steam tug 'R. G. Townsend.'

"Second. On or about the 9th of January, 1901, a certain lot of 1883 bags of sugar, while on board of a certain lighter called the "Bangor," in the waters of the port of New York, was in danger of being destroyed by fire, and the tug 'R. G. Townsend,' belonging to the petitioner, at great risk and peril, saved the said cargo of sugar from destruction by said fire.

"Third. The said sugar had been imported from a foreign country, and was subject to duty under the laws of the United States; and
13 at the time of said fire had not been delivered to the consignees and was still in the possession and under the control of custom-house officers of the United States.

"Fourth. The duties on said sugar amounted to $6,000, and said sum had been paid to the Government of the United States.

"Fifth. On the 25th of February, 1901, petitioner filed a libel in the District Court of the United States for the Eastern District of New York, against the said cargo of sugar, to recover salvage compensation for the services rendered in saving said sugar. The owner of the sugar thereafter appeared and claimed the sugar, and filed an answer to the libel, and such proceedings were had that on the 20th day of April, 1901, the court made a decree awarding the petitioner salvage for its said services in saving the sugar, and fixing the amount of the award for said salvage services at ten per cent of the value of the property saved, and by said decree awarded to the petitioner as salvage the sum of $1,274.03.

"Sixth. In fixing said sum the District Court considered the invoice value of the sugar only, and in no way awarded a percentage of the value of the estimated duties saved to the United States by said salvage services.

"Seventh. A copy of said decree is a copy of said decree referred to above.

"Eighth. Petitioner has duly filed its petition herein in this district and served a copy thereof on the United States district attorney for this district and mailed a copy of the same by registered letter to the Attorney-General of the United States and filed affidavit of such service and mailing with the clerk of this court."

The defendants here ask for the following conclusions of law, viz:

"Second. If the said sugar had been destroyed by fire the owners thereof would have been entitled under the statute to make application to
14 the Secretary of the Treasury for a refund of the duties paid upon said sugar, but that the granting of said petition would have been entirely a matter of discretion with the said Secretary of the Treasury, and his decision in the premises would have been final and not subject to review by this or any other court.

"Fourth. If said sugar had been destroyed by fire the Government would not have lost the right to its duties, but could have maintained a suit for their recovery."

The finding of these conclusions would tend to determine the matter in favor of the Government, because it might then rest with the Secretary of the Treasury to determine whether the salvage should be paid or not. Although it may be assumed that the Secretary would act correctly in the case, in such event there would be no legal right to a judgment.

The Tucker Act, under which this action was brought, provides (chap. 359):

"Be it enacted, &c., That the Court of Claims shall have jurisdiction to hear and determine the following matters:

"First. All claims founded upon the Constitution of the United States or any law of Congress * * * or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable.

* * * * * * *

"Sec. 2. That the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the Circuit Courts of the United States shall have concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury.

"Sec. 3. * * *

"The judgment of said court or the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. * * *

"Section 7. That it shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts." (1 Suppt. to Rev. Stats., pp. 559, 561.)

The claim in this action is founded upon an implied contract, based upon the principle that the Government has undertaken to do what it ought to do. The law has been recently discussed in a salvage claim against the Government, and it was held that the United States courts have jurisdiction to determine such a claim. (United States v. Morgan, 99 Fed. Rept., 579.)

By reason of the amount involved that action was in the Circuit Court, but the discussion applies here, and it is unnecessary to go over the same ground.

On the question of the conclusions sought the Government refers to D. M. Ferry & Co. v. United States (85 Fed. Rept., 550). That was a case where a petition was filed under section 2984 of the Revised Statutes,

and the Secretary of the Treasury made a ruling relative to duties which had been paid. It was sought to review such ruling, but the court held it could not be done. Referring to the case of Nichols v. United States (7 Wall., 122), it was said (555):

"To avoid the effect of the Nichols case upon the question before us, it is pointed out that in that case the revenue laws themselves
16 provided a remedy by which the taxpayer might bring the Secretary's decision under review in the courts, but that here there is no such provision. This is true, but the Nichols case did not proceed on the ground that there had been an appeal to the courts provided for within the revenue acts themselves; nor was it intimated that a suit in the Court of Claims would have been permitted had no such appeal to the courts been provided. On the contrary, the plain effect of the decision is that if the intention of Congress is manifest to create the Secretary of the Treasury a tribunal to decide whether a wrong has been committed under the revenue law, and has made no provision for an appeal, because the revenue law provides a complete system within itself, the presumption must be that it was intended to make the decision of the special tribunal thus established final."

It would seem that no conclusion of law should be made here which would apparently affect the jurisdiction of this court to determine the question involved, and I decline to make the Government's proposed conclusions.

I adopt the following conclusions of law, as proposed by the petitioner, viz:

"CONCLUSIONS OF LAW.

"First. At the time of the salvage aforesaid the United States had an interest in said sugar to the amount of $6,000.

"Second. By reason of said salvage service the said sum of $6,000 in duties has been saved to the United States.

"Third. The petitioner is entitled to recover as salvage herein the same percentage on the sum so saved to the United States as was allowed by the United States District Court for the Eastern District of New York against the sugar itself, to wit, ten per cent.

"Fourth. The petitioner is entitled to judgment against the United States for the sum of $600."

Judgment for petitioner for the sum of $600.

17 At a stated term of the District Court of the United States for the Southern District of New York, held at the court room in the borough of Manhattan, on the 2nd day of June, 1904.

Present: Hon. George B. Adams, district judge.

THE CORNELL STEAMBOAT COMPANY, PETITIONER,
vs.
THE UNITED STATES, DEFENDANT.

This cause coming on to be heard, and having been argued and submitted by counsel for the respective parties, and the court having, by its findings of fact and conclusions of law, found that the petitioner is

entitled to recover herein of the United States, by reason of the matters and things in the petition stated, the sum of six hundred dollars.

Now, on motion of Benedict & Benedict, attorneys for the petitioner, it is

Ordered, adjudged, and decreed by the court that the petitioner—the Cornell Steamboat Company—recover of the United States, defendant, the said sum of six hundred dollars, together with the sum of three 60/100 dollars, disbursements, for fees of the clerk of court, amounting together to the sum of six hundred and three 60/100 dollars; and that judgment be entered for said sum of six hundred and three 60/100 dollars in favor of said petitioner against the said defendant.

GEO. B. ADAMS.

(Endorsed:) Final decree and judgment. Filed June 2, 1904.

18 By the honorable George B. Adams and George C. Holt, judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To the Cornell Steamboat Company, greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the borough of Manhattan, in the city of New York, in the district and circuit above named, on the 20th day of July, 1904, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of New York, wherein The United States, plaintiff in error (defendant below), and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 22nd day of June, in the year of our Lord one thousand nine hundred and four, and of the Independence of these United States the one hundred and twenty-eighth.

(Sgd.) GEO. B. ADAMS,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) Citation. Filed June 2, 1904.

19 United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES, PLAINTIFF IN ERROR (DEFENDANT below),
vs.
THE CORNELL STEAMBOAT COMPANY, DEFENDANT IN error (petitioner below).

Assignment of errors.

Afterwards, to wit, on the 22nd day of June, 1904, October term of the above court, come the United States of America, by Henry L.

Burnett, their attorney for the Southern District of New York, and say that in the record and proceedings in the above-entitled action there is manifest error in this, to wit:

First. That the District Court erred in refusing to find the defendant-plaintiff in error's second proposed conclusion of law, as follows:

"Second. If the said sugar had been destroyed by fire, the owners thereof would have been entitled under the statute to make application to the Secretary of the Treasury for a refund of the duties paid upon said sugar, but that the granting of said petition would have been entirely a matter of discretion with the said Secretary of the Treasury, and his decision in the premises would have been final and not subject to review by this or any other court."

20 Second. That the District Court erred in refusing to find the defendant-plaintiff in error's fourth proposed conclusion of law, as follows:

"Fourth. If said sugar had been destroyed by fire, the Government would not have lost the right to its duties, but could have maintained a suit for their recovery."

Third. The District Court erred in not finding the defendant-plaintiff in error's second and fourth conclusions of law, and in not giving judgment thereon in favor of the defendant-plaintiff in error, dismissing the petitioner-defendant in error's petition.

Fourth. The District Court erred in finding as a conclusion of law that the claim in this action is founded upon an implied contract, based upon the principle that the Government has undertaken to do what it ought to do.

Fifth. The District Court erred in holding that no conclusion of law should be made here which should apparently affect the jurisdiction of this court to determine the question involved, and in not dismissing the petition for lack of jurisdiction.

Sixth. The District Court erred in holding that at the time the salvage occurred the United States had an interest in said sugar to the amount of six thousand dollars, or in any other sum.

Seventh. The District Court erred in holding that by reason of said salvage service the said sum of six thousand dollars in duties, or any other sum, had been saved to the United States.

Eighth. The District Court erred in holding that the petitioner is entitled to recover as salvage herein the same percentage on the sum so saved to the United States as was allowed by the United States

21 District Court for the Eastern District of New York against the sugar itself, to wit, ten per cent.

Ninth. The District Court erred in holding that the petitioner is entitled to judgment against the United States for the sum of six hundred dollars, or any other sum.

Tenth. The District Court erred in granting judgment for the petitioner for the sum of six hundred dollars.

Eleventh. The District Court erred in overruling the demurrer to the petition interposed by the defendant-plaintiff in error.

Twelfth. The District Court erred in not sustaining the demurrer of the defendant-plaintiff in error to the petition, on the ground that the court had no jurisdiction of the alleged cause of action.

Thirteenth. The District Court erred in not sustaining the demurrer of the defendant-plaintiff in error to the petition, on the ground that the said petition did not state facts sufficient to constitute a cause of action against the said defendant-plaintiff in error.

HENRY L. BURNETT,
United States Attorney for the Southern District of New York, and Attorney for the Defendant-Plaintiff in Error.

(Endorsed:) Assignment of errors. Filed June 22/1904.

22 United States District Court, Southern District of New York.

THE CORNELL STEAMBOAT COMPANY, PETITIONER,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT.

It is hereby stipulated and agreed that a bill of exceptions on behalf of the defendant is hereby dispensed with, it appearing that all questions which could therein be raised can be raised by the assignments of error on appeal.

Dated New York, June 21st, 1904.

(Sgd.) BENEDICT & BENEDICT,
Attorneys for Petitioner.

(Sgd.) HENRY L. BURNETT,
United States Attorney.

(Endorsed:) Stipulation. Filed June 27, 1904.

23 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
THE CORNELL STEAMBOAT COMPANY, DEFENDANT IN error.

It is hereby stipulated and agreed that the foregoing is a true and complete record in the above-entitled case, and that it be printed as such.

Dated New York, June 21st, 1904.

HENRY L. BURNETT,
United States Attorney, Atty. for Plaintiff in Error.
BENEDICT & BENEDICT,
Attorneys for Defendant in Error.

24 United States Circuit Court of Appeals for the Second Circuit.

No. 107.—October Term, 1904.

Argued December 21, 1904. Decided March 1, 1905.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
THE CORNELL STEAMBOAT COMPANY, DEFENDANT in error.

Error to the District Court of the United States for the Southern District of New York.

Before Judges Wallace, Lacombe, and Coxe.

This cause comes here upon writ of error to review a judgment of the District Court, Southern District of New York, in favor of the defendant in error, which was plaintiff below. The claim against the United States was prosecuted under the Tucker Act of March 3, 1887 (1 Supp. to Rev. Stat., 559), which confers concurrent jurisdiction upon the Court of Claims and the several District and Circuit Courts in suits against the United States for "all claims founded upon the Constitution of the United States * * * or upon any contract expressed or implied with the Government of the United States, or for damages liquidated or unliquidated in cases not founded in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."

LACOMBE, circuit judge:

The facts out of which the claim arises are these: The firm of B. H. Howell, Son & Co. imported a lot of sugar into the port of New
25 York, and by the act of importation became indebted to the Government for customs duties thereon. The market value of the sugars in that port on January 9, 1901, was $18,127.74, which included the duties assessed at $6,000. The sugar came into the possession of the customs officers, the Government having a lien upon the same for the duties. The duties were paid, but the sugar had not been delivered to the consignee, remaining in the custody of the officers of the customs on January 9, 1901. It was on board a certain lighter called the "Bangor," in the waters of the port of New York, and on the day named was in danger of being destroyed by fire, whereupon the tug "R. G. Townsend," belonging to the plaintiff below, at great risk and peril, saved the lighter and the cargo of sugar from destruction by said fire. Thereafter the owners of the "Bangor" settled with the steamboat company for salvage services, and the last-named company brought a libel in the District Court, Eastern District of New York, against "1,883 bags of sugar, lately on board the lighter 'Bangor,'" to recover for salvage services rendered to the cargo. The cause came on for trial; it was found that libellant was entitled to salvage, and the award was fixed at 10 per cent of the value of the property saved. The court was satisfied that had the cargo been destroyed consignees would have been entitled to a rebate of the duties paid ($6,000) under sec. 2984, U. S. Rev. Stat., and therefore, concluding that the Government was interested in the sugar to that amount, awarded ten per cent against the consignee only on the balance left after deducting that sum from the market value. No award was made against the United States in that proceeding in rem in admiralty, presumably because the court was satisfied that it had no jurisdiction to bring the Government in as a party to such suit. The Davis (10 Wall., 16).

Thereupon the plaintiff filed under the Tucker Act a petition the equivalent of a complaint, bill, or libel, setting forth the facts above recited. Defendant demurred; demurrer was overruled with leave to answer; answer was served, but was subsequently withdrawn and
26 the case submitted to the court upon the pleadings for a written opinion setting forth the specific findings of fact and conclusions of law and rendering judgment thereon in conformity to the practice under that act.

If it be assumed that the Government had such an interest in the sugar as to be directly benefited by the salvage service, the District Court under the Tucker Act would have jurisdiction to entertain petition for a salvage award. It is unnecessary to add anything to the discussion of this subject which will be found in the opinion of the Court of Appeals for the Fourth Circuit, U. S. v. Morgan (99 F. R., 570). The important and fundamental question in the case is as to the construction of section 2984. It reads as follows:

"SEC. 2984. The Secretary of the Treasury is hereby authorized, upon production of satisfactory proof to him of the actual injury or destruction, in whole or in part, of any merchandise, by accidental fire or other casualty, while the same remained in the custody of the officers of the customs in any public or private warehouse under bond * * * or while in custody of the officers of the customs and not in bond, or while within the limits of any port of entry, and before the same have been landed under the supervision of the officers of the customs to abate or refund, as the case may be, out of any moneys in the Treasury not otherwise appropriated, the amount of impost duties paid or accruing thereupon, and likewise to cancel any warehouse bond or bonds, or enter satisfaction thereon in whole or in part, as the case may be."

Provision for such abatements or refunds is made in:

"SEC. 3689. There are appropriated, out of any moneys in the Treasury not otherwise appropriated, for the purposes hereinafter specified, such sums as may be necessary for the same, respectively; and such appropriation shall be deemed permanent annual appropriations. * * * For refunding duties paid or accruing on goods, wares, or merchandise injured or destroyed by accidental fire or other casualty while in the custody
of the officers of customs, in any public or private warehouse,
27 * * * or after their arrival within the limits of any port of
entry of the United States, and before the same have been landed under the supervision of the officers of the customs."

It is contended by plaintiff in error that under these sections there is confided to the Secretary of the Treasury an absolute and irreviewable discretion to refund or to refuse so to do. That "if the sugar had been entirely destroyed by fire there was no legal obligation on the part of the Secretary of the Treasury to refund the duties paid, even though manifest justice indicated that a petition for refund should be granted." In support of this proposition there is cited the decision of the Court of Appeals for the Sixth Circuit in D. M. Ferry & Co. v. U. S. (85 F. R., 550). In that case, as in this, imported merchandise which had paid duty was destroyed by fire while in the custody of the customs officers and petition was filed under the Tucker Act to obtain a refund of duties. It appeared that more than a year before the passage of that act a claim for the same refund had been presented to the Secretary of the Treasury and by him rejected. This was sufficient to defeat the plaintiff, because the section of the Tucker Act which gave jurisdiction to the courts expressly provided that nothing therein "shall be construed as giving to either of the courts therein mentioned jurisdiction to hear and determine * * * claims which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same." The Court of Appeals, however, discussed

section 2984 at considerable length. It held that Congress might, if it saw fit, make the Secretary the final arbiter in any class of cases arising under the revenue laws to determine in a quasi-judicial manner whether by virtue of those laws any claim against the Government has arisen in favor of the petition; and that "as neither sec. 2984 nor any other part of the revenue laws gave to the Federal courts appellate power to revise the decision of the Secretary of the Treasury, under the section he was made the final judge or tribunal to decide upon the validity
28 of the claim in question." Undoubtedly it is the Secretary, not the court, who is to pass upon the proofs; it is his judgment, not the court's which is to be satisfied that the facts authorizing refund exists. In the Ferry case he rendered a decision that "on the facts stated the petitioner did not bring his case within the section, and that therefore the petition filed under the section must be rejected." The court had no power to review or revise that decision and, therefore, threw out the claim. But if on the other hand the facts stated by the petitioner brought his case within the section and such proof was presented that the Secretary became satisfied of the existence of those facts, we do not find in the Ferry case authority for the proposition that nevertheless the Secretary might refuse to allow the refund arbitrarily and capriciously. On the contrary there is high authority the other way. In Supervisors v. U. S. (4 Wall., 435), the court considered a statute which provided that a board of supervisors "may, if deemed advisable," levy a special tax to pay certain indebtedness. It held the language to be peremptory, saying: "The conclusion to be deduced from the authorities is, that where power is given to public officers in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty." See also City of Galena v. Amy (5 Wall., 705). An interesting case to the same effect where the language construed was "whenever it shall be shown to the satisfaction of the * * * commissioners that the city sold * * * and received value
29 therefor * * * and it shall appear equitable to them to make such conveyance"—is found in Provisional Municipality v. Lehman (57 F. R., 324). In U. S. v. Thoman (156 U. S., 353), where a consideration of the full text of the statute led the court to the conclusion that the use of the word "may" was intended by the legislature to be permissive only, they quoted with approval from Minor v. Mechanics' Bank (1 Pet., 46), the statement that: "no general rule can be laid down upon this subject further than that that exposition ought to be adopted in this, as in other cases, which carries into effect the true intent and object of the legislature in the enactment."

It seems quite apparent that the intent and object of the legislature was to afford relief to unfortunate importers who might be able to satisfy

the Secretary by sufficient proof that they came within the terms of the section. So careful was the legislature to secure that relief that it provided a perpetual annual appropriation from which the repayments might be made. It would certainly defeat that object if after being satisfied that the proofs established all the prerequisite facts which the section called for, the Secretary might nevertheless arbitrarily refuse to make the payment.

In the case at bar all question as to whether the proof produced of actual injury, etc., by accidental fire while in the custody of the customs officers was satisfactory to the Secretary is eliminated. The case is presented on a demurrer which concedes all the facts averred. It must therefore stand conceded that had the salvors not intervened a loss would have occurred under circumstances which would have brought the importer within the provisions of sec. 2984. It can not be supposed that the Secretary would find the undisputed facts otherwise than as they were proved to him to be; it may fairly be assumed that undisputed facts would be susceptible of convincing proof; and since all the facts enumerated in the section are conceded it must be presumed that their presentation to the Secretary would satisfy him that the importer was within the terms of the section.

30 The next question is whether by reason of its liability to refund the $6,000 duties in case of the destruction of the property the United States had such an interest in that property that salvors, who by saving the property save the Government from paying out such sum, may be entitled to a salvage award on the basis of the money thus put to risk.

Counsel for the petitioner calls attention to an English authority where the proposition established was in principle the same as that presented here. Five Steel Barges (15 P. D. Rep., 142). In that case salvage services were rendered to five barges built by defendant for the Government and which were being towed from Chepstow to Portland. At the end of the towage two of barges were given up to the Government. An action of salvage in personam was brought against defendants in respect to these two barges, and in rem against the remaining three. It was argued that plaintiffs were not entitled to recover as against the two barges, because they were not asserting their right as a maritime lien, but have instituted their action in personam. The court said:

"As to the two which have been given up to the Government, I think it is perfectly clear on the authorities that an action in personam lies against the owners of a vessel saved, even though the property has been transferred to others, and the lien lost. In this case, however, the property does not appear to have been in the defendants, because it would, I think, under the contract, be in the Government. But on this point I am of opinion that the right to sue in personam is not confined to the case of the defendant being the actual legal owner of the property saved. I think it exists in cases where the defendant has an interest in the property saved, which interest has been saved by the fact that the property is brought into a position of security. The jurisdiction which the court exercises in salvage cases is of a peculiarly equitable character. The right to salvage may arise out of an actual contract; but it does not

necessarily do so. It is a legal liability arising out of the fact
31 that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject. I think that proposition equally applies to the man who has had a benefit arising out of the saving of the property. In this case the defendants were under contract with the Government to supply them with barges at a certain price. Payment was to be made by certain instalments, of which only one remained unpaid at the time of the services. I think if * * * these instalments were all paid on condition that the barges should be delivered all within twelve months of the date of the contract, it would follow that, if defendants had not been in a position to deliver the barges within the twelve months, then either they would have been liable in damages for not performing the contract, or liable to make restitution of the instalments which had been paid them on conditions not fulfilled by them. It appears to me then that they had substantially an interest to the full amount of the barges at the time of the services, and that the same moral obligation to which the law has given force in the case of an owner applies to those who have an interest in the property. This is certainly the business-like view of the matter."

In the Port Victor, 9 Asp. Mar. Law Cas. (N. S., 163), where Government stores were being carried at the risk of charterers, the charterers were held to a personal liability to pay salvage because they "were directly interested in the preservation of the goods and the salvage service was a direct benefit to them." Justice Jeune cited the Five Steel Barges with approval, holding that "a man who has had a benefit arising out of the saving of property is liable to a claim for salvage no less than the actual owner of it." The Port Arthur was affirmed and the principle laid down in the Five Steel Barges favorably commented on by the Court of Appeals in 9 Asp. Mar. Law Cas. (N. S., 183).

We are of opinion that the Government in the case at bar had
32 an interest in the sugar to the extent of the duties. It had a lien on the sugar till the duties were paid, and since they were paid under a statute which provided for their refund in case of the destruction of the sugar by accidental fire it had an interest which should in all fairness respond to the individuals whose salvage services prevented the loss which the Government would sustain by making such refund.

The judgment of the district court is affirmed.

Arthur M. King, assistant United States attorney, for the plaintiff in error.

R. D. Benedict, for the defendant in error.

33 United States Circuit Court of Appeals for the Second Circuit.

No. 107.—October term, 1904.

Argued December 21, 1904. Decided March 2, 1905.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
THE CORNELL STEAMBOAT COMPANY, DEFENDANT in error.

Error to the District Court of the United States for the Southern District of New York.

Before Judges WALLACE, LACOMBE, and COXE.

WALLACE, circuit judge (dissenting):

I can not concur in the judgment of the court. I think that the statute (§ 2984) is permissive and not mandatory, and was intended to authorize the Secretary of the Treasury to remit any duties which in justice and according to his judgment the importer ought not to lose. If it is mandatory, the Secretary has no discretion and the Government may become liable to refund duties on merchandise injured or destroyed without the fault of any of its officers and in their custody merely for the accommodation of the importers and under circumstances in which the loss should properly and reasonably fall upon the importer rather than upon the Government. The intention of Congress to subject the Government to such a liability in cases where the importer would have no legal claim against an individual under the same circumstances is not to be inferred in the absence of any more significant evidence than the phrase "The Secretary of the Treasury is hereby authorized." The words "hereby authorized" are equivalent to "may." Even

34 when the word "shall" is used in statutes, it is, as against the Government, to be construed as "may" unless a contrary intention is manifested. R. R. Co. v. Hecht (95 U. S., 168). Clearly "may" should not be construed as against the Government as "shall," unless this meaning is compelled by the nature of the power confided, or because the exercise of the power to its fullest extent is a plain duty to those interested in it.

35 At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the post-office building in the city of New York on the 13th day of March, one thousand nine hundred and five.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, circuit judges.

UNITED STATES, PLAINTIFF IN ERROR,
vs.
CORNELL STEAMBOAT COMPANY, DEFENDANT in error.

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

W. J. W.
E. H. L.
A. C. C.

36 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. U. S. vs. Cornell Steamboat Co. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 13, 1905. William Parkin, clerk.

37 UNITED STATES OF AMERICA, *Southern District of New York, ss.*

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 36 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of United States against Cornell Steamboat Co., as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 7th day of April, in the year of our Lord one thousand nine hundred and five, and of the independence of the said United States the one hundred and twenty-ninth.

[SEAL.] WM. PARKIN, *Clerk.*

38 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America, to the honorable the judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:

Being informed that there is now pending before you a suit in which the United States is plaintiff in error, and the Cornell Steamboat Company is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

39 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the honorable Melville W. Fuller, Chief Justice of the

United States, the fourth day of May, in the year of our Lord one thousand nine hundred and five.

[SEAL.] JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

40 (Indorsed:) File No. 19724. Supreme Court of the United States. No. 624, October term, 1904. The United States vs. The Cornell Steamboat Company. Writ of certiorari. United States Circuit Court of Appeals, Second Circuit. Filed May 12, 1905. William Parkin, clerk.

41 Supreme Court of the United States, October term, 1904.

THE UNITED STATES, PETITIONER, *vs.* THE CORNELL STEAMBOAT COMPANY. } No. 624.

Stipulation as to return.

It is hereby stipulated by counsel for the parties in the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the Circuit Court of Appeals for the Second Circuit to the writ of certiorari issued herein.

H. M. HOYT,
Solicitor-General.
ROBERT D. BENEDICT,
Counsel for Respondents.

May 5, 1905.

(Endorsed:) U. S. vs. Cornell Steamboat Co. Stipulation. United States Circuit Court of Appeals, Second Circuit. Filed May 12, 1905. William Parkin, clerk.

42 *To the Supreme Court of the United States, greeting:*

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed, and under direction of counsel for the petitioner is hereby certified as a return to the writ of certiorari issued herein.

Dated New York, May 12th, 1905.

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

43 (Indorsed:) United States Circuit Court of Appeals, Second Circuit. U. S. v. Cornell Steamboat Co. Return to certiorari.

44 (Indorsement on cover:) File No. 19724. Supreme Court U. S. October term, 1904. Term No. 624. The United States, petitioner, vs. The Cornell Steamboat Company. Writ of certiorari and return. Filed May 15, 1905.

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